## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### Opinion Below.

The opinion in the Court of Claims is reported in 38 Fed. Supp. 844 (R. 10).

### Jurisdiction.

The judgment in the Court of Claims was entered May 5, 1941 (R. 14). This Court has jurisdiction to review the judgment below under Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 939.

### Statement.

A statement of the facts, question presented, statutes and regulations involved, and error relied upon, will be found in the foregoing petition.

### ARGUMENT.

I.

**The Court of Claims mistakenly treated denial of certiorari in the Loose-Wiles Biscuit Co. case as a decision by this Court on the merits.**

This Court has frequently stated that the denial of a writ of certiorari is not to be taken as any indication of its views on the merits of a question. In *United States* v. *Carver*, 260 U. S. 482, 490 (1923), Justice Holmes, speaking for the Court, said:

> "The denial of a writ of certiorari imports no expression upon the merits of the case as the Bar has been told many times."

Similar observations have been made by this Court in *Atlantic Coast Line Railroad Company* v. *Powe*, 283 U. S. 402, 404 (1931), and *Hamilton-Brown Shoe Company* v. *Wolf Brothers Company*, 240 U. S. 251 (1916).

Notwithstanding these explicit pronouncements, the Court of Claims' opinion clearly shows that it viewed the denial of a writ of certiorari in the *Loose-Wiles Biscuit Co.* case as a persuasive factor in this case (R. 13), and it is a fair inference from the entire opinion that, had the Court observed the rulings of this Court as to lack of significance of a denial of certiorari, its decision might have gone the other way. We quote from the opinion (R. 13):

> "While the Supreme Court has stated that denial of a writ of certiorari adds no authority to the opinion sought to be reviewed, we feel that denial of the writ in *Loose-Wiles Biscuit Co.* v. *Rasquin, supra*, is a factor of some persuasive value in determination of the instant question. The court is aware of the limited purposes for which writs of certiorari are granted by the Supreme Court, and the restricted significance of denials thereof. *Hamilton-Brown Shoe Co.* v. *Wolf*, 240 U. S. 251; *United States* v. *Carver*, 260 U. S. 482; *Atlantic Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401; *Stamey* v. *United States*, 37 Fed. (2d) 188; Rule 38, paragraph 5, Rules of the Supreme Court of the United States. However, it feels it worthwhile to indicate that the *Hamilton-Brown Shoe Company* case, wherein the Supreme Court apparently first had occasion to note the restricted significance of denials, involved refusal to review an interlocutory decree and that the court expressly recognized the nonfinality of the lower court's decree as a sufficient ground alone for refusing the writ. The *Carver* and *Powe* cases, *supra*—the other reported opinions in which the Supreme Court has spoken directly upon this subject—merely repeat the general proposition that denial of the writ imports no expression of opinion upon the merits of the case.

"The question involved in the petition for certiorari to the Supreme Court in the *Loose-Wiles* case, *supra,* was upon a final judgment of the lower court, was narrowly defined and was identical with that now before us. In these circumstances, we feel it proper not only to give thoughtful consideration to denial of the writ in that case, but to regard it as of some persuasive value in determination of the question here involved. See *United States* v. *Musselshell State Bank of Musselshell, Mont., et al.,* 60 F. (2d) 157, 159; *Hornell Ice & Cold Storage Co.* v. *United States,* 32 Fed. (Sup.) 468, 471."

II.

**The statute taxes the first use of the oil in the United States in the manufacture of an article intended for sale, and, since plaintiff's use of the oil was admittedly not the first such use, it is not liable for the tax.**

The tax imposed is not upon the oil, but upon the *use* of the oil. The use taxed is the first use in the United States and not the second, third, fourth or a subsequent use. Petitioner bought the oil and mixtures from companies which engaged in the business of refining and selling coconut oil and coconut oil products. It is undisputed that their use and not the petitioner's was the first use of the oil in the United States (R. 7).

The tax is imposed upon the first domestic processing of various oils or of any combination of oils with respect to any of which there has been no previous first domestic processing. In re *Loose-Wiles Biscuit Co.* opinion the repetition of the phrase "first domestic processing" was viewed as justifying the conclusion that it was equivalent to "taxable domestic processing", although clearly, in view of the definition that followed, the exact repetition reflected merely careful draftsmanship. The term "first domestic processing" is expressly defined to mean "the first use in the

United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed". In the *Loose-Wiles Biscuit Co.* opinion this explicit definition was not even referred to.

Under the statute, therefore, the "first domestic processing", that is, the "first use in the United States", is the specified event to which the tax attaches. By established statutory construction the tax is imposed only when the specified event, here the first use in the United States, occurs after the date of enactment of the statute. In the present case the first use in the United States had occurred prior to the enactment of the statute.

The Government does not dispute the intended prospective application of the statute and doubtless its regulations were initially drafted with no other thought. It was natural to bring out that the tax was imposed only on a specified event occurring after the effective date of the Act. If, for example, the tax had been on importation, the regulations could properly have read that the tax was imposed only on the importation of an article after the effective date of the Act, thereby excluding importations prior thereto. But a statement that the tax is imposed only on *the first* domestic processing *after* the effective date of the Act does not exclude, as the statute intended, first domestic processings, prior thereto, because the phrase is read as if "the domestic processing first after", etc.

Accordingly, the regulations by a trick of language appear to give the statute a prospective application, while in fact asserting for it a retroactive application. The imposition of a tax on the first domestic processing on or after the effective date of the Act, as provided by the regulations, is an entirely different thing from the imposition of a tax on first domestic processings which occur on or after the effective date of the Act, or on every first domestic processing

occurring on or after the date of the Act, as the statute clearly prescribes.

Although the regulations might properly indicate by appropriate language that only specified events, namely, first domestic processings, occurring on or after the effective date of the Act are subject to tax, they have no right to vary the *definition* in the statute of the specified taxable event, which is unequivocably stated to be the "first use in the United States". By no stretch of interpretation can the definition in the statute of "first domestic processing" be distorted to mean the first use in the United States after the effective date of the Act. Except for the well-established rule of construction, there might be some question whether first domestic processings occurring before the enactment of the statute should be subject to tax, but that would be an entirely different question from the meaning of "first domestic processing", as to which the statute permits no doubt that it is the "first use in the United States".

When the regulations state that "first domestic processing" means the "first use in the United States on or after the effective date of the Act", the statement is just as false and unfounded as though it read that "first domestic processing" means the "first use in the United States after next Christmas". There can only be one first use in the United States, regardless of the date of any statute, just as there can be only one importation of an article. And since first domestic processing is the first use in the United States, there can be only one first domestic processing. Whether such first domestic processing occurs before or after the effective date of the Act determines its taxability. When the regulations provide for tax on the first domestic processing after the effective date of the Act, instead of on such first domestic processings as occur after the effective date of the Act, they stultify the law through the shift in meaning of "first" from absolute to relative.

The legislative history of the statute confirms the intent of Congress as expressed in its language and provides no support for the labored interpretation of the *Loose-Wiles Biscuit Co.* decision. The report of the Committee on Ways and Means (No. 704, 73d Congress, 2d session, 1934, p. 41) states:

> " 'Processing' is defined as the first use of the oil in manufacture or production of an article for sale. The tax applies to processing in the United States, including the territories, but not the possessions. To prevent avoidance of the tax by the performance of preliminary processing outside of the United States, the tax is likewise imposed upon the first processing in the United States of mixtures or combinations in chief value of coconut oil or sesame oil, or of both oils."

As a matter of policy Congress desired to avoid a tax on importations from the Philippines and accordingly adopted as the taxable event the next step, namely, the first processing in the United States. In so doing it had no intention of subjecting to tax the second, third or fourth processing of oils which prior to the enactment of the statute had been both imported into the United States and undergone a first domestic processing.

Once the statute and the regulations be read with the radical difference in meaning between "first" and "first after" in mind, no possible ambiguity can be attributed to the statute and the only ambiguity is in the regulations, which should properly provide that the tax is imposed, not on the first domestic processing on or after the effective date of the Act, but on any and every first domestic processing occurring on or after the effective date of the Act, or on all first domestic processings on or after the effective date of the Act, or on all such first domestic processings as occur on or after the effective date of the Act. Of different forms of expression, only that used in the regulations

results in misrepresenting and obscuring the clear language of the statute.

**Conclusion.**

The duty of the Court of Claims was to decide the issue before it in accordance with the plain language and intent of the statute. This it did not do, but allowed itself to be swayed in its judgment by considerations outside the statute, as, for example, its assumption that the collection of the tax places no undue burden on those who had previously purchased stocks of coconut oil, but left them on the same level as their competitors who had not purchased such stocks (R. 14).

The writ prayed for should be granted.

Respectfully submitted,

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